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Report of the Working Group on Arbitrary Detention on its follow-up visit to Malta*

Note by the Secretariat

The Working Group on Arbitrary Detention conducted a follow-up visit to Malta from 23 to 25 June 2015 at the invitation of the Government. Throughout the visit, the Working Group enjoyed the fullest cooperation of the Government. It had the honour to be received by the President of the Republic and by some of the highest authorities of the State. The Working Group was able to hold confidential interviews with prisoners and detainees at the Corradino Correctional Facility, the main prison of the country; the Young Offenders Unit Rehabilitation Services; the Safi detention centre in Safi Barracks; the Hal Far open centre; the Forensic Unit at Mount Carmel Hospital; and the newly established initial reception centre for children.

In the present report, the Working Group notes that the judicial system of Malta continues to be affected by lengthy delays in the administration of justice, as well as diminished access by individuals to due process. The Working Group notes with satisfaction that, according to recent amendments to the Criminal Code, persons deprived of their liberty now have the right to access to a lawyer immediately after their arrest and during the first 48 hours of their detention, although this right does not apply to police interrogation. Another positive development relates to the age of criminal responsibility, which has been raised from 9 to 14. However, juveniles between 16 and 18 years of age, who are children according the Convention on the Rights of the Child (to which Malta is a State party), continue to be sent to General Courts for adults, instead of the Juvenile Court.

The Working Group takes note of the fact that, in 2012, a restorative justice act entered into force. It established a new parole system, which has already allowed 38 persons to be released. However, this system still requires the financial resources necessary to become fully operational, as well as improvements so that foreigners are able

* The present document was submitted late so as to include the most up-to-date information possible.

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to benefit from it. The Government has also taken several measures to improve the treatment of prisoners and detainees, such as providing them with educational programmes, along with mental health and social services.

The Working Group reiterates that the rights to asylum and refugee status are recognized as basic human rights. During the visit, it observed that asylum seekers, immigrants and refugees who arrive in an irregular manner continue to be detained. The drastic reduction in arrivals by sea and the improvement in internal administrative procedures have allowed a reduction of the average period of detention to two months. However, those whose applications are rejected may be detained for up to 18 months as permitted by law.

The Working Group emphasizes that, instead of automatic and mandatory detention of irregular immigrants, less restrictive measures should be applied, such as deposit of documents, reporting conditions, community release or supervision, and designated residence. According to the Working Group, detention should be applied only when all other alternatives have proved it necessary, and be reasonable in all circumstances, proportionate to a legitimate purpose, non-discriminatory and subjected to judicial review.

In the report, the Working Group mentions that legislative changes have been introduced to reform the automatic nature of detention for migrants in an irregular situation, refugees and asylum seekers. Legislation concerning the application of the directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals has been adopted, the Immigration Act has been amended to open up the possibility of challenging such detentions, temporary permits to work for up to three months have been established, and a voluntary return programme has been designed. The Reception of Asylum Seekers Regulation was also amended.

Among the positive new initiatives, the Working Group also highlights the attention given to children and to immigrants with psychosocial and intellectual disabilities. Children will no longer be detained. After an assessment of their identity, health and age by the corresponding governmental agency, namely the Agency for the Welfare of Asylum Seekers, they will be transferred to special houses or placed under the care of carefully vetted families. For that purpose, a new initial reception centre for children has already been set up.

The Working Group points out that the conditions of detention of migrants in the Safi detention centre situated in Safi Barracks have improved. The drastic reduction in the number of detainees has obviously contributed to that improvement. However, the Working Group noted a lack of educational and social programmes and deficiencies in the legal aid provided to detainees. In addition, the Working Group was concerned about the fact that a detention facility for migrants was located in military barracks.

The Working Group was informed that there is an initial review of a detention after a period of seven working days in detention. The Immigration Appeals Board shall grant release when detention is no longer requested. An applicant should be provided with free legal assistance and representation during the review of the lawfulness of his or her detention. Free legal assistance before the Board would be extended, but such an extension would not cover proceedings before the Civil, Constitutional or European Courts.

According to the Working Group, holding people in open centres without long-term planning for their integration cannot be considered as a suitable solution for them or for Maltese society. Authorities should facilitate the integration of these persons into society, mainly through labour and education programmes but also through alternative housing provided by other stakeholders. The Working Group notes that programmes for the

integration of migrants, asylum seekers and refugees into Maltese society remain inadequate.

The Working Group further recommends the incorporation of the Convention on the Rights of the Child into domestic legislation.

The cooperation of civil society organizations, particularly religious institutions with considerable expertise and experience in these areas, should be sought. No military presence in the management of the detention centres should be authorized.

Long-term planning for people living in open centres should be undertaken. The Government should explore alternative placement options. The Working Group considers that community-based placement is more respectful of the human rights of migrants, asylum seekers and refugees, and more likely to empower them to participate in case-resolution processes. Free legal aid should be extended to migrants in an irregular situation, even before the appeal stage of the review process. Such aid should not be limited to applications before the Immigration Appeals Board but rather should be extended to appeals before the Civil, Constitutional and European Courts.

Lastly, the Working Group highlights that a comprehensive solution to migration flows, and to the situation of refugee and asylum seekers, should involve countries of origin, transit and destination, especially the States members of the African Union and of the European Union.

Report of the Working Group on Arbitrary Detention on its follow-up visit to Malta**

I. Introduction

1. The Working Group on Arbitrary Detention, established pursuant to former Commission on Human Rights resolution 1991/42, whose mandate was clarified by the Commission in its resolution 1997/50 and extended for a further three-year period by the Human Rights Council in its resolution 24/7 of 26 September 2013, conducted a follow-up country visit to Malta from 23 to 25 June 2015 at the invitation of its Government. The Working Group was represented by its Second Vice-Chair, Sètondji Roland Adjovi (Benin), and Mads Andenas (Norway), and supported by the Secretary of the Working Group, Miguel de la Lama, and a staff member from the Office of the United Nations High Commissioner for Human Rights (OHCHR), Yiyao Zhang.

2. Throughout the follow-up visit and in all respects, the Working Group enjoyed the fullest cooperation of the Government of Malta and all authorities with whom it dealt. The Working Group would like to extend its gratitude and appreciation to the Government for its positive response to the request of the Working Group to carry out its follow-up visit and for its full cooperation before and during the visit. The Working Group would like to continue the constructive dialogue with the Government of Malta on the issues mentioned in the present report.

3. The Working Group was able to meet with and interview confidentially some persons deprived of liberty, without the presence of authorities, guards or witnesses, as required by its mandate.

4. The Working Group would like to thank the representatives of civil society organizations, particularly the Jesuit Refugee Service and Malta Catholic Action, for their support during the visit and for providing the Working Group with important information and assistance. Additionally, the Working Group wishes to thank colleagues at the Office of the United Nations High Commissioner for Refugees (UNHCR) for their valuable assistance.

II. Programme of the follow-up visit

5. During its three-day visit, the Working Group met with various authorities from the executive, legislative and judicial branches of the State. The delegation had the honour to be received by the President of Malta; the Minister for Foreign Affairs; the Minister for Home Affairs and National Security; the Minister of Justice, Culture and Local Government; the Permanent Secretary of the Ministry for Home Affairs and National Security; magistrates of the Juvenile Court; and the Social Affairs Committee of the Parliament. The Working Group also met with representatives of the Armed Forces of Malta, the Malta Police Force, the Agency for the Welfare of Asylum Seekers, the Immigration Appeals Board, the Board of Visitors for Detained Persons, and the Board of Visitors of the Prisons. The delegation also met with the Ombudsman, the Commissioner for Children, and representatives from relevant United Nations agencies and civil society organizations. The Working Group is very grateful for the cooperation of all the authorities and interlocutors with whom it met during the visit.

** Circulated in the language of submission only.

6. The delegation visited the Corradino Correctional Facility, the Young Offenders Unit Rehabilitation Services, the Safi detention centre situated in Safi Barracks, the Hal Far open centre, the newly established initial reception centre for minors, and the Forensic Unit at Mount Carmel Hospital.

7. The Working Group was able to visit all these places upon its request and to interview, in private, a sample of individuals, some of whom were selected by the delegation, without any restriction.

III. Status of the implementation of recommendations contained in the report on the 2009 visit of the Working Group

8. The following is the analysis of the implementation of the recommendations made by the Working Group at the end of its 2009 visit (see A/HRC/13/30/Add.2, para. 79).

Recommendation made in relation to criminal justice

9. The Working Group recommended in 2009 allowing access to lawyers for persons arrested on suspicion of having committed a criminal offence during the first period of up to 48 hours while in police custody.

10. According to the Constitution, police should either file charges or release a detainee within 48 hours. If the person is not released within the first six hours, the arresting police officer must inform a magistrate. At the moment of the arrest, the arresting police officer should inform the detainee of his or her right to have access to a lawyer and of his or her entitlement to legal aid. During the 2009 visit by the Working Group, access to legal counsel was permitted only after the initial 48-hour period of detention. The right to legal assistance before police interrogation is one of the basic guarantees of a fair hearing. According to article 6.1 of the European Convention on Human Rights, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.

11. According to article 355AT of the Criminal Code of Malta, a person arrested and held in police custody at a police station or other authorized place of detention shall, if he or she so requests, be allowed as soon as practicable to consult privately with a lawyer or legal procurator, in person or by telephone, for a period not exceeding one hour (para. (1) of article 355AT). Compliance with such a request may be delayed if the person making the request is in police detention for a crime and if an officer not below the rank of superintendent authorizes such delay (para. (3)). In no case, however, shall the delay exceed 36 hours from the time of the arrest (para. (7)).

12. During its follow-up visit, the Working Group noted that, according to the Maltese authorities, amendments had been made to the Criminal Code guaranteeing that persons deprived of liberty have the right to consult a lawyer immediately after the arrest. In 2014, the Criminal Code was amended to include a provision which guarantees the right of the suspects or accused to be informed without undue delay of their procedural rights. As provided in article 534AB, these procedural rights include the right of access to a lawyer and any entitlement to free legal advice (Right to information and Letter of Rights, added by IV.2014.25).

13. Accordingly, authorities are now allowing detainees to have access to legal counsel during the 48-hour detention period and prior to initial interrogation. The detainee is currently entitled to speak to a lawyer in private, as soon as it is practicable, in person or by telephone.

14. The Working Group welcomes the change in the Criminal Code introduced in 2014. It emphasizes that the right of access to a lawyer should be further elaborated and defined by law. Particularly, it should include the right to be assisted by a lawyer during police interrogation. The fact that one is able to contact a lawyer should not affect the right to remain silent, contrary to the current practice as described to the Working Group.

15. The Working Group observed that suspects are still kept in detention for lengthy periods before trial. The maximum time of pretrial detention is 12 months for those accused of offences with a maximum sentence of less than four years, 16 months for sentences with a maximum sentence of between four and nine years, and 20 months for sentences with a maximum sentence of nine years or more. These time limits do not apply automatically; detainees can still make a bail application once these periods have been completed. The Working Group is of the view that the law should be more protective of the rights of the accused and put the burden on the prosecution to prove why such a pretrial detention needs to be prolonged and, more importantly, provide for judicial review of any extension.

Recommendations in relation to juvenile justice

16. The Working Group recommended in 2009 that the minimum age of criminal responsibility for juveniles be increased to 12 years in accordance with paragraph 32 of general comment No. 10 (2007) of the Committee on the Rights of the Child, that the assumption that a juvenile aged between 9 and 14 years could act with "mischievous discretion" be eliminated, and that the juvenile justice system be extended to children between the ages of 16 and 18 years.

17. During the follow-up visit, authorities expressed their intention to address juvenile criminality with a more social approach instead of a punitive one. On 14 February 2014, the Criminal Code was amended to raise the age of criminal responsibility from 9 to 14 years. According to article 35 (1), substituted by III.2014.2. Cap. 285, "a minor under fourteen years of age shall be exempt from criminal responsibility for any act or omission". According to Act No. III of 2014, as cited by Justice Services in 2014, the age of criminal responsibility was raised to 14 years. The Working Group welcomes the raising of the age of criminal responsibility from 9 to 14 years.

18. In Maltese law, children are deemed to be capable of "malicious discretion"[1] (*doli capax*) and can be held responsible. The Working Group welcomes the fact that article 36 of the Criminal Code concerning "minors under fourteen but over nine years acting with discretion" has been repealed by Act III.2014.3. It is noted by the Working Group that the Criminal Code provides that minors under the age of 14 will be deemed incapable of formulating the requisite criminal intent. Minors between the ages of 14 and 16 are also exempt from criminal responsibility if they act without mischievous discretion. The Working Group also welcomes the fact that article 37 of the Criminal Code, substituted by III.2014.4., further provides that the penalty will be decreased if the act or omission is committed by a minor who is aged between fourteen and sixteen years of age with mischievous discretion and that, if the minor is aged between sixteen and eighteen years, the applicable penalty shall be decreased by one or two degrees.

19. The Working Group was pleased to learn about amendments made to the Criminal Code regarding the criterion of "mischievous discretion" for children between 14 and 16 years of age, shifting the burden of proof to the prosecution. "Mischievous discretion" should also be proved and not simply assumed.

20. The Working Group remains concerned, however, about the fact that the Juvenile Court can hear matters involving children who are in conflict with the law only if they are

[1] It appears to the Working Group that "malicious discretion" is intended to refer to "malicious intent".

under the age of 16, and that children between 16 and 18 years of age are still being tried as adults and subject to criminal law and criminal courts for adults, in violation of the Convention. According to article 2 of the Juvenile Court Act, "a child or young person means a person who is under the age of sixteen years". The Juvenile Court only hears charges against and holds other proceedings relating to children under the age of 16 years.

21. The Working Group considers that children under 18 years of age should be treated as children and not be brought before or sentenced by tribunals for adults. In this regard, the Working Group concurs with the Committee on the Rights of the Child that Malta should bring its juvenile justice system fully into line with international standards (see CRC/C/MLT/CO/2, para. 66 (b)). In particular, the Working Group reiterates that Malta should extend the scope of its juvenile justice system to include all children under the age of 18. The Working Group also recalls that the arrest, detention or imprisonment of a child not only should be in conformity with the law but also should be used only as a measure of last resort and for the shortest appropriate period of time.

Recommendations in relation to detention under immigration authorities

22. Malta ranks second in the world in the number of refugees per square kilometre and has Europe's second-highest rate of granting asylum per capita. In 2008, the increase in the immigrant population exceeded the national birth rate for the first time. Since 2002, more than 19,000 people have reached Malta, a country with a population of 423,000 inhabitants and an area of 316 km^2. Between 2002 and 2012, UNHCR in Malta received 15,832 asylum applications. In 2014, there were 2,200 applications for asylum submitted, mainly from citizens of Libya.

23. The Working Group is fully aware that thousands of migrants, asylum seekers and refugees, coming mainly from Africa, have arrived in Malta since 2002. At first, most people arrived on boats carrying about 30 people. That trend changed during 2008 to larger boats carrying between 100 and 400 persons. In 2008, 2,800 migrants arrived by sea. In 2013, there were 2,006 persons who arrived by sea. While the number declined drastically in 2014, since most migrants were rescued at sea by the Italian and Maltese coast guards and taken to Italian harbours, mainly in Lampedusa and Sicily, hundreds of asylum seekers continued to arrive in Malta by plane, with or without proper documentation.

24. Today, asylum seekers arrive mainly by air. As of February 2016, 886 persons had been granted refugee status in Malta, 11,243 individuals had received subsidiary protection, and 1,694 persons had been granted other forms of complementary protection.[2]

25. In 2009, the Working Group recommended that Malta change its laws and policies related to administrative detention of migrants in an irregular situation and asylum seekers, so that detention would be decided upon by a court of law, on a case-by-case basis and pursuant to clearly and exhaustively defined criteria in legislation, under which detention might be resorted to, rather than being the automatic legal consequence of a decision to refuse admission of entry or a removal order. It also recommended ruling out immigration detention for vulnerable groups of migrants, including unaccompanied children, families with children, pregnant women, breastfeeding mothers, elderly persons, persons with disabilities, and people with serious and/or chronic physical or mental health problems. During the follow-up visit in 2015, the Working Group noted that migrants belonging to vulnerable groups were no longer subjected to detention.

26. Migrants who arrive in an irregular manner continue to be systematically and routinely detained. The detention of these persons is based upon articles 5, 14 and 16 of the Immigration Act related to the offence of illegal entry into Maltese territory and removal.

[2] See www.unhcr.org.mt/charts/category/17.

The period of detention varies from 2 to 12 months pending adjudication of their asylum requests. The drastic reduction in arrivals by sea and the improvement in internal administrative procedures have resulted in a reduction of the average detention period to about two months. Migrants whose applications are rejected can be detained for up to 18 months as permitted by law.

27. The detention policy of Malta affects migrants arriving irregularly in the country. Under Maltese immigration laws, detention is the automatic consequence of a refusal to grant admission to national territory. The practice therefore continues to be to detain all migrants who arrive on the territory in an irregular manner. However, the Working Group notes that the Government of Malta is making efforts to ensure that each case is studied on its own merits, asylum seekers are detained only as a measure of last resort, and migrants who have not applied for asylum or are rejected at all stages can be detained only as long as there is a realistic prospect for removal.

28. The Working Group learned during its visit that even persons with a valid visa may be detained if they cannot prove that they have sufficient financial means to stay in Malta. It also learned that others arrive without valid documents or after having destroyed their passports at the moment of their arrival in order to request political asylum or refugee status.

29. It is provided in article 14 of the Maltese Procedural Standards in Examining Applications for International Protection Regulations that a person declared to be a beneficiary of international protection shall be entitled to remain in Malta and to be granted a residence permit.

30. Aside from the peak observed in 2008, the number of asylum seekers and refugees arriving in Malta has remained close to an average of 1,600 persons a year. The severe and negative physical and psychological consequences of prolonged detention have been very well documented.

31. The Working Group is of the view that detention should not be used to discourage migrants at risk who wish to apply for asylum in Malta. The Working Group notes that legislative changes are being introduced to reform the quasi-automatic nature of detention for irregular migrants. The Working Group welcomes the further changes that relevant authorities are currently working on, especially in relation to migrant children and removal orders.

32. The Working Group was informed that the Ministry for Home Affairs and National Security had prepared a bill to amend the Immigration Act of 1970. In the draft amendment act, changes are proposed to article 14 of the Immigration Act, which sets out mandatory pre-removal detention to ensure that removal orders are issued only when necessary. According to the proposed revision of article 14 (4), all the effects of a removal order shall be suspended if the person who is subject to it has filed an application for asylum and pending the final determination of that application. The removal order shall again come into force following the final rejection of the asylum application. In addition, the proposed revision to article 14 (7) provides that the principal immigration officer shall not execute any return decision or removal order if appeals proceedings before the Immigration Appeals Board are pending.

33. However, the Working Group understood during its visit that civil society organizations, especially those with several years of expertise in providing assistance to refugees and asylum seekers, had not yet been consulted on the proposed legislative changes. Thus, the Working Group encourages relevant authorities to fully consult such organizations during this process. In this regard, the Working Group was pleased that the Social Affairs Committee of the Parliament had expressed to the Working Group its commitment in that respect.

34. The Working Group acknowledges that some significant improvements have been made concerning migrants, refugees and asylum seekers. The Working Group welcomes the establishment of an initial reception system. It is anticipated that this will change the practice of automatically detaining migrants in an irregular situation, refugees and asylum seekers from the outset. A new initial reception centre for minors has already been established and should prevent the detention of children. This centre will host unaccompanied migrant children, as well as accompanied migrant children with up to two family members, upon arrival, and allow for registration, medical clearance and age assessment before their eventual transfer to an open centre.

35. According to information received from the authorities, plans are still under way to convert Lyster Barracks detention centre into a temporary initial reception centre for adults. The Working Group also received information that the construction of a new facility to be used as an initial reception centre would soon be initiated. However, the Working Group emphasizes that military facilities should not be used for the detention of irregular migrants, especially children. After the visit, the Working Group was pleased to learn, through official channels, that the plan to convert Lyster Barracks had been discarded and that the initial reception centre for adults had been sited at Marsa instead.

36. The Working Group visited the Safi detention centre, situated in Safi Barracks, an army base. The centre, distributed in four blocks, contains 134 beds; during the visit, however, there were only six detainees. Some of them had arrived from Algeria or the Syrian Arab Republic by plane and had spent 24 hours detained at Malta International Airport in Valletta before being brought to the centre. One detainee had a valid visa but insufficient financial resources for his stay in Malta. The tourist visa of another detainee had expired. A Nigerian who reported having permanent resident status in Spain had spent four months in the centre. All detainees had gone through identity checks and medical examinations. During the follow-up visit, the Working Group learned that legal aid was expected to be provided on Tuesdays, but that no detainees were seeking legal aid at the time of the visit, which happened to be on a Tuesday. Detainees had access to a telephone and were able to meet with relatives for five minutes a day. With regard to the legal aid service, the Working Group notes that, according to the Government of Malta, legal aid is provided upon request and there are no fixed days for it.

37. The Working Group also visited the Hal Far open centre for immigrants, outside Valletta, run by the Agency for the Welfare of Asylum Seekers, which falls under the remit of the Ministry for Home Affairs and National Security. The Centre has a capacity of 800 persons. During the visit of the Working Group, 260 persons were present. In the open centres, migrants enjoy freedom of movement but are requested to undergo movement registration three times a week. If an adult migrant residing in the open centre plans to be absent for several days, the Agency requests to be informed of the absence in advance.

38. The Working Group received information that 889 persons were living in three open centres, including the Hal Far open centre, which consisted of prefabricated container housing units that had replaced scores of tents. Most of them were asylum seekers awaiting decisions on their applications. Some migrants whose applications for asylum had already been rejected were also hosted there. Residents reported that they suffered uncomfortable living conditions, including inadequate ventilation and high temperatures in the summer months, in addition to overcrowded conditions in some units. Residents had been referred to the Centre by immigration authorities.

39. The Working Group was informed that, although the open centres were locked and guarded by security officers, residents were allowed to enter and exit the premises freely. Residents were allowed to stay for a maximum period of one year. Their beds would be reassigned after three weeks of absence to other migrants in need. It was brought to the attention of the Working Group that some residents had arrived at the centre in April 2014,

which means that they had been held there for more than 12 months. The Working Group was informed that, during their stay at the open centre, residents were offered accommodation and free food, and were provided with a transportation allowance to enable them to travel to the city centre. In addition, the Working Group was informed that the centre would provide English-language courses, computer training and cultural orientation.

40. There were complaints from some residents that the food they were given lacked variety. They had been offered chicken at every meal for a long time and there was an absence of fruit. A man complained that his observation of religious dietary and fasting rules had not been respected. In this regard, the Working Group was pleased to learn after its follow-up visit that the offered meals had been replaced with a food allowance, which allowed each resident to purchase food of his or her choice.

41. In this regard, the Working Group encourages the Government of Malta to take all measures necessary to improve the living conditions in the open centres. The Working Group notes the commitment of the Government to addressing the challenges related to the detention of migrant children. The Working Group was informed that Malta had made a commitment to ensuring that migrant children would no longer be subject to detention. It was informed that, upon arrival, children, including unaccompanied children and families with children, would be taken to an initial reception centre for minors. The Working Group reiterates that children who find themselves without parental protection are dependent on States to uphold their rights.

42. During its trip, the delegation visited a newly established reception centre for children, which had not yet been used. The centre had been designed as a temporary facility for registration, medical clearance and age assessment, when necessary. It could host a maximum of 134 persons, and was equipped with family rooms, a playroom for children, and offices for international organizations and agencies, such as UNHCR. Residents would be provided with a welcome bag containing basic personal sanitation items and blankets. Prepared meals would be provided free of charge to residents. Personnel at the reception centre had collected some clothes and toys to be distributed to migrant children. These items had been stored in two storage rooms that were shown to the Working Group.

43. In respect of migrants in an irregular situation whose age cannot be otherwise determined, an age assessment and determination procedure has been implemented by the Agency for the Welfare of Asylum Seekers. The Working Group noted that the procedure involves a psychosocial assessment, with referral for a medical examination only if necessary. Whenever the relevant assessment leaves room for doubt as to whether the person is a child or not, the authorities consider and treat the person concerned as a child.

44. In its 2009 report, the Working Group also recommended that the Government provide in all cases for automatic periodic review by a court of law of the necessity and legality of detention.

45. The lack of an effective process for judicial review of immigration detention constituted one of the main problems observed by the Working Group during its first visit to the country.

46. The Government indicated that processes for reviewing the detention of migrants had been introduced, including for those migrants who were due to be returned to their countries of origin. Based on the proposed legislative changes, the first review was to be conducted by the principal immigration officer within the first three months of the detention, while the Immigration Appeals Board would have jurisdiction thereafter. The Working Group was pleased to learn that, according to the proposed amendments, the mandate of the Board would be expanded to providing a full review of the legality and grounds of detention, and that a detainee would also be able to challenge his or her detention before a court, with eligibility for legal aid throughout the process. The Working

Group was informed that the Board would have the authority to grant release when detention was no longer required.

47. The Working Group was not in a position to assess the efficiency of this mechanism during its follow-up visit since it was not yet fully in force. However, the Working Group looks forward to receiving information in this regard, including on the capacity of the courts to review the proportionality of detention.

48. With respect to the recommendation made by the Working Group that the Government provide for an effective remedy for detainees to challenge the necessity and legality of detention at any point during a detention period and ex post facto and define the circumstances, it was brought to the attention of the Working Group that effective and speedy remedies for detainees to challenge the necessity and legality of detention at any point during their detention were still lacking. Although free legal assistance and representation before the Immigration Appeals Board will be provided once the law is enacted, the future regime will not enable such public defence lawyers to bring procedures before the civil and the constitutional courts or the European regional justice mechanisms. The Working Group stresses that the amendments under discussion should ensure that the judicial review of immigration cases covers the necessity and proportionality of the measures taken in each individual case, in line with the requirements of international law. In this regard, the Working Group encourages the Government of Malta to refer to relevant principles and guidelines in the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (see A/HRC/30/37, annex). The new amendments should also allow a defence lawyer to bring cases before all existing tribunals or mechanisms, including civil and constitutional courts, international human rights bodies and the European Court of Human Rights.

49. The Working Group had recommended in 2009 that, where there remained a regime of mandatory administrative detention for migrants in an irregular situation, the Government should legally define the maximum period of such detention rather than relying on Government regulations or policy to make such a determination. During its follow-up visit, the Working Group welcomed the plan to define the maximum period of detention. The amendments under discussion would establish a maximum period of detention of 18 months for migrants in an irregular situation and 9 months for asylum seekers, subject to administrative review introduced in 2014.

50. The Working Group notes that some alternatives to detention have been put in place. It emphasizes that, instead of automatic and mandatory detention, less restrictive measures should be applied, such as bail, home curfew, deposit of documents, reporting conditions, and community release or supervision in a designated residence. Detention should be applied only when necessary, reasonable in all circumstances, proportionate to a legitimate purpose, non-discriminatory and subject to judicial review.

51. As to its recommendation that the Government provide for a system of legal aid for immigration detainees, the Working Group observed during its visit that, while legal assistance for asylum seekers was provided through the valuable work of non-governmental organizations, such efforts were insufficient to ensure the provision of legal aid to all detainees. The Government would need to invest more in providing such legal assistance, as that was its international obligation.

52. The Working Group was informed that the Government provided asylum seekers with free legal aid only at the appeal stage of the application process, before the Immigration Appeals Board. Government officials indicated to the Working Group that changes would be introduced in the legal aid system and that legal aid would be provided at

all stages. An agency had been created to provide specialized legal aid prior to the appeal stage.

53. However, at the time of its follow-up visit, it was brought to the attention of the Working Group that, in practice, access to effective legal assistance, especially for indigent foreigners, remained very limited. The Working Group noted that persons being held at the immigration detention centre were not clearly aware of their status and rights and that their access to legal aid appeared to be very limited.

54. In this regard, the Working Group recommends that Malta make additional efforts to bring the legal aid system into compliance with international human rights standards, in terms of both resources and effectiveness. Free legal aid should be also provided for appeals before the Civil, Constitutional and European Courts, as well as for the presentation of cases before international human rights bodies.

55. In 2009, the Working Group observed that Malta was carrying a disproportionate burden and did not have the necessary financial and other resources at its disposal. The Working Group therefore appealed to the international community to assist the Government in bringing its immigration detention regime into conformity with applicable international human rights law and standards while reminding Malta of its international human rights obligations.

56. As of February 2016, 886 persons had been granted refugee status in Malta, 11,243 individuals had received subsidiary protection and 1,694 persons had been granted other forms of complementary protection.[3]

57. The Working Group is also concerned that European States have ignored the migration problem in the Mediterranean for too long. In 2014, European countries agreed to receive only 150 migrants from Malta, while the United States of America agreed to receive 500. According to the Maltese authorities, Malta can accept only 200 asylum seekers and refugees per year.

58. In this respect, the Working Group fully acknowledges the need for a comprehensive response at the African, European and universal levels to the challenges posed by irregular immigration worldwide. If shared responsibility in Europe were effective, it could help identify solutions and alleviate suffering. Furthermore, the Working Group calls on all countries in the vicinity, including countries in the Middle East, to accept refugees and to consider giving financial contributions if they cannot host any.

Recommendations in relation to monitoring mechanisms

59. The Working Group recommended after its first visit to Malta, in 2009, that the Government strengthen the status, powers and functions of the Board of Visitors of the Prisons and the Board of Visitors for Detained Persons to provide for more effective monitoring of detention facilities, as designated national preventive mechanisms under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Working Group explained that this would include the extension of their respective mandates to the aspect of legality of detention that had not been ordered by a court, including administrative detention and "detention within detention" as a form of disciplinary measure, as well as the publication of all their reports addressed to the Ministers of Justice and Home Affairs. The Working Group further recommended that the Government strengthen the status, powers and functions of the Office of the Ombudsman in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

[3] See www.unhcr.org.mt/charts/category/17.

60. During its follow-up visit, the Working Group received information concerning the monitoring mechanisms, namely the Board of Visitors of the Prisons and the Board of Visitors for Detained Persons, the qualifications of the board members and their expertise in relation to detention. The Working Group is convinced that the mandate of the two Boards must be protected by law and that they should be given the authority to request changes in detention conditions, when necessary.

61. The Board of Visitors for Detained Persons was established in 2007. It submits reports and makes recommendations to the Minister for Home Affairs and National Security. Staff of the Board visit detention centres every week, monitor detention conditions, receive complaints from detainees and conduct interviews with the centre's authorities. A psychiatrist regularly accompanies Board members during their visits. Members of the Board also visit detained persons when they are transferred for treatment, for example to Mount Carmel Hospital for mental health treatment. As provided by Legal Notice 266 of 2007, amended by Legal Notice 251 of 2012, "the Board and every member thereof shall have access at any time to every part of the detention centres and to every detainee and may interview any detainee out of the sight and hearing of all officers". The Working Group holds the view that the mandate of this Board could be extended beyond the closed detention centres to other places, such as the mental hospital, elderly care facilities and even private houses, whenever reliable information exists that individuals are being deprived of their liberty.

62. The Working Group is aware that the jurisdiction of the Ombudsman is limited to the Public Administration and that this mechanism reports to the Parliament. The Working Group learned during its follow-up visit that the Ombudsman had proposed the appointment of a commissioner on detention services to review complaints and investigate detention-related issues. Although this proposal has not been taken up by the Government, the Working Group understands that the current Ombudsman has the mandate under the Ombudsman Act of 1995 to receive and act upon complaints regarding administrative actions taken by or on behalf of Government and other authorities in relation to detention and immigration detention. It has also been noted by the Working Group that the Office of the Ombudsman has in the past investigated complaints lodged by migrants when their fundamental human rights have allegedly been breached. In addition, the Working Group has been informed by the Government that there is a presence of the Ombudsman's office at the Corradino Correctional Facility to ensure that complaints regarding public administrative matters from persons deprived of their liberty are properly reviewed. In this regard, the Working Group encourages the Ombudsman to play a more proactive role in receiving and reviewing complaints regarding public administrative matters from persons deprived of liberty.

63. The Working Group also takes note of the commitment of Malta to establish a national human rights institution in full compliance with the Paris Principles, and encourages Malta to speed up the establishment process of such an institution.

IV. Additional findings

64. In regard to correctional facilities, the Working Group visited the Corradino Correction Facility, the main prison of the country, which operates under the auspices of the Department of Correctional Services. It has the capacity to hold 540 inmates, although in May 2014 640 inmates were residing there. At the time of the visit, there were 543 inmates, including 42 women, of which 345 inmates were citizens of Malta and 198 were foreigners, including some asylum seekers, while 110 prisoners were in pretrial detention and 433 had been convicted.

65. Some improvements have taken place in the prison over the past three years. Some qualified prisoners have been granted the authorization to work outside the prison. The solitary confinement cells are now very rarely used and, even when they are used, the Working Group was informed that it is only for a few hours.

66. The Working Group found a 15-year-old boy at the Young Offenders Unit of the prison. He had spent two months there, awaiting trial before the Juvenile Court. Children were following educational and integration programmes, provided with the assistance of non-governmental organizations. However, the Working Group stresses that children and young offenders should be separated, as recommended by the Committee on the Rights of the Child in line with article 37 (c) of the Convention on the Rights of the Child and article 10 (2) (b) of the International Covenant on Civil and Political Rights.

67. The Working Group notes with concern the limitations on access to education and training opportunities, especially for female inmates. The Working Group is also concerned that pretrial detainees are detained together with convicted persons, in violation of article 10 (2) (a) of the International Covenant on Civil and Political Rights, to which Malta is a party. The Working Group welcomes plans for a separate unit for female juveniles.

68. In January 2012, the Restorative Justice Act entered into force. The Act includes a provision for granting parole to prisoners, and establishes an offenders assessment board, a victim support unit, a remission board and a victim-offender mediation committee. The parole board is headed by a retired judge. The Department of Probation and Parole is currently supervising 23 persons. Thirty-eight persons have already been released on parole. However, the parole system needs more financial resources to be fully developed. The current requirements appear to lead to de facto discrimination because only citizens of Malta can in practice benefit from parole, while foreigners serving sentences lack the consolidated family environment to take advantage of such an opportunity for rehabilitation. In this regard, the Government of Malta has explained to the Working Group that the aim of parole is to facilitate the reintegration of offenders into the community following their successful adherence to the individualized care plan developed while serving their sentence in prison. For this purpose, those inmates who apply and have a stable family and employment structure upon release have an advantage over others, especially foreigners. Furthermore, as the Restorative Justice Act points out, all European Union nationals are eligible to apply for parole. The Government of Malta informed the Working Group that a number of European Union nationals, as well as inmates who have humanitarian protection in Malta, have been granted a parole licence.

69. It is also essential that the pretrial detention period be shortened as much as possible.

70. During its visit, the Working Group was pleased to learn from the Government that the military would no longer be involved in managing the detention centres for immigrants. Its role would be restricted to search-and-rescue activities. However, the Working Group emphasizes that an open reception facility for immigrants should not be established or built on military premises.

71. The Working Group is concerned about the absence of a procedure to identify stateless persons and persons at risk of statelessness.

72. It is of serious concern to the Working Group that, besides the limited resettlement, assisted voluntary return and integration programmes that exist, there is a lack of long-term planning for persons residing at the open centres. Given the limited resources and job opportunities in Malta, many of them are experiencing difficulties integrating into Maltese society. This precarious condition can only be a challenge for all, both for the migrants themselves and for Maltese society in general, in the years to come, negatively affecting the integration process but also exposing migrants to the misleading attraction that criminal enterprises sometimes present. Whether those in the open centres enjoy effective liberty and

humane conditions would be critical in any assessment of whether such centres are not indeed a new form of deprivation of liberty.

73. In relation to long-term planning for migrants, asylum seekers and refugees residing in Malta, the Working Group recommends that the Government explore alternative placement options. It was brought to the attention of the Working Group that civil society organizations and religious bodies in Malta have years of experience in providing community-based placement for migrants, asylum seekers and refugees. In addition, from observations on the ground, it appears that community-based placement can better meet the needs of this group of people and empower them to participate in the case resolution process. The Working Group thus suggests that the Government of Malta work together with those civil organizations and religious bodies which have ample experience working in this area to create more opportunities for migrants, asylum seekers and refugees to reside in the community.

V. Conclusions

74. **The Working Group is of the opinion that efforts should be made by the judicial system of Malta to address challenges related to lengthy delays in the administration of justice, as well as limited access by individuals to due process.**

75. **The Working Group notes with satisfaction the recent amendments to the Criminal Code according to which persons deprived of their liberty now have the right to access to a lawyer immediately after their arrest and during the first 48 hours of their detention. However, this right should also applied in all cases in which a person is detained by police forces, in order to ensure that police interrogations are conducted in conformity with international human rights obligations.**

76. **The Working Group notes with concern that judicial authorities are, in practice, interpreting that, if a detainee makes use of his or her right to have a lawyer, he or she loses the right to remain silent.**

77. **The Working Group commends the authorities of Malta for the recent reforms related to increasing the age of criminal responsibility, which has been raised from 9 to 14 years. However, the Group is concerned that juveniles aged between 16 and 18 years of age, who are children according the Convention on the Rights of the Child, continue to be sent to General Courts for adults, instead of the Juvenile Court.**

78. **The Working Group acknowledges with satisfaction that in 2013 a new parole system was established. Nevertheless, the Working Group is aware that the parole system needs more financial resources in order to be fully operational.**

79. **The Working Group welcomes the measures adopted by the Government to improve the treatment of prisoners and detainees, such as by providing educational programmes, vocational training, mental health care and social services.**

80. **The significant reduction in the number of arrivals since 2013 has contributed to an improvement in the situation. More people found at sea by the Maltese and Italian coast guards are being transported to Italian harbours. Most migrants in an irregular situation are now coming to Malta by air.**

81. **The Working Group reiterates that the right to seek and enjoy asylum should be recognized as a basic human right in accordance with the Universal Declaration of Human Rights and relevant applicable international law.**

82. **The Working Group was able to verify substantial changes in the system of treatment of these persons compared with the situation prevailing during its first visit**

in 2009. The Working Group is nevertheless of the view that the Government of Malta should employ more resources to enable its public servants to be sensitive to the fact that refugees and asylum seekers have experienced traumatic events and are fleeing their places of origin due to fear of persecution. Asylum seekers, immigrants and refugees who arrive in Malta in an irregular manner continue to be systematically and routinely detained.

83. The Working Group takes note of the legislative changes already introduced to reform the automatic nature of detention for migrants in an irregular situation, refugees and asylum seekers. Legislation concerning the application of the directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals has been adopted, the Immigration Act has been amended in order to allow for detentions to be challenged, temporary permits to work for up to three months have been established, and a voluntary return programme has been designed.

84. However, the period of detention still varies from 2 to 12 months pending adjudication of an asylum request. The drastic reduction in arrivals by sea and the improvement in internal administrative procedures have allowed the reduction of the average detention period to two months. Those with rejected applications are still detained for up to 18 months as permitted by law. Automatic detention continues to be the norm and early release the exception, a situation which is not in conformity with international law. Authorities asserted that initial detention was necessary in order to identify the detainee, verify her or his nationality, and establish his or her age and the state of his or her physical and psychological health. These reasons cannot justify detention during long periods of up to 12 months. In cases involving people whose application for asylum has been refused and who are awaiting deportation, their detention can last for up to 18 months.

85. The Working Group is aware of the positive steps taken by the Government to establish a new system of reception for asylum seekers, refugees and migrants in an irregular situation, through the establishment of initial reception centres. After one week in such a centre, immigrants, refugees and asylum seekers will be transferred either to an open centre or to a detention centre, like Safi Barracks, on the basis of an individual detention order, which can be appealed before the Immigration Appeals Board.

86. The Working Group would like to highlight the positive measures taken in relation to children and to migrants with psychosocial and intellectual disabilities. Children will no longer be detained; after their identity, health and age is registered by the corresponding governmental agency, the Agency for the Welfare of Asylum Seekers, they will be transferred to special houses or placed in the care of foster families.

87. The Working Group found migrants in an irregular situation and asylum seekers in the Corradino Correctional Facility, the main prison of the country, where 543 persons are currently detained. The Working Group observed that people in pretrial detention continued to be held together with convicts, in contravention of international norms.

VI. Recommendations

88. The Working Group welcomes the cooperation received from the Government of Malta during its follow-up visit and wishes to continue this cooperation. The Working Group would like to make the recommendations listed below.

In relation to migrants, asylum seekers and refugees

89. **The Working Group recommends that the Government:**

(a) **End the regime of mandatory and automatic detention for asylum seekers, refugees and migrants in an irregular situation and replace it with a reception system;**

(b) **End the military presence in the management of the detention centres;**

(c) **Ensure that migrants in an irregular situation, refugees and asylum seekers are informed about their rights, as well as the regulations and procedures, following their arrival in Malta;**

(d) **Further reduce the duration of administrative detention of migrants in an irregular situation. The Working Group recommends that detention should be applied when necessary, reasonable in all circumstances, proportionate to a legitimate purpose, non-discriminatory and subject to judicial review. The criteria of necessity and responsibility should always be respected. In addition, the Working Group recommends that less restrictive measures should be applied, such as bail, home curfew, deposit of documents, reporting conditions, community release or supervision-designated residence;**

(e) **Extend free legal aid to migrants in an irregular situation, refugees and asylum seekers before the appeal stage of the review process. Such aid should not be limited to recourse before the Immigration Appeals Board but rather extended to appeals before the Civil, Constitutional and European Courts, as well as international human rights bodies;**

(f) **Design long-term planning for people living in open centres. The Government should explore alternative placement options. The Working Group suggests that the Government of Malta work together with civil society organizations and religious bodies that have ample experience in providing community-based placement to create more opportunities for migrants, asylum seekers and refugees to reside in the community;**

(g) **Prioritize the cooperation of civil society organizations, particularly religious institutions with considerable expertise and experience in these areas. These organizations have a substantial contribution to make regarding the legislative drafts that the Government is preparing in order to design a new system for reception of immigrants, refugees and asylum seekers that is not based on detention.**

In relation to criminal justice

90. **The Working Group recommends that the Government improve facilities and provide educational, social and integration programmes in correctional facilities and detention centres, while equal opportunities should be provided to female and male inmates.**

In relation to juvenile justice

91. **The Working Group recommends that the Government:**

(a) **Incorporate the Convention on the Rights of the Child into domestic legislation with regard to the scope of its juvenile justice system;**

(b) **Separate persons below the age of 18 from adults in correctional facilities and detention centres. The Working Group stresses that children should never be detained together with adults.**